

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 12th day of March, two thousand thirteen.

PRESENT: GERARD E. LYNCH,
RAYMOND J. LOHIER, JR.,
SUSAN L. CARNEY,
Circuit Judges,

UNITED STATES OF AMERICA,

Appellee,

v.

No. 12-1576-cr

TREVLON BUTTERS,

Defendant- Appellant.

FOR APPELLANT: DARRELL B. FIELDS, Federal Defenders of New York,
Inc., New York, N.Y.

FOR APPELLEE: LAN NGUYEN, Assistant United States Attorney, *for* Loretta
E. Lynch, United States Attorney for the Eastern District of
New York, Brooklyn, N.Y.

Appeal from the United States District Court for the Eastern District of New York
(Sandra L. Townes, *Judge*).

1 UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND
2 DECREED that the case is REMANDED to the district court for resentencing.

3 Defendant-appellant Trevlon Butters appeals from the judgment of the district court,
4 entered April 19, 2012, convicting him upon his guilty plea of a single count of possession
5 of a firearm by a felon in violation of 21 U.S.C. §§ 922(g)(1) and 924(a)(2), and sentencing
6 him principally to 70 months' imprisonment. We assume the parties' familiarity with the
7 facts and procedural history of this case, as well as with the issues on appeal.

8 Butters appeals his sentence on procedural grounds, arguing that the district court
9 erroneously applied a two-level upward adjustment for obstruction of justice due to Butters's
10 misrepresentation that he was a United States citizen during interviews with pretrial services
11 and probation officers. Butters argues that (1) his lie did not relate in some manner to the
12 underlying offense or related conduct, as required by U.S.S.G. § 3C1.1(2); (2) the district
13 court did not make the necessary finding that Butters had the specific intent to obstruct
14 justice; and (3) the record would not support such a finding of specific intent.

15 A district court's findings of fact regarding obstruction of justice are reviewed for
16 clear error, and its ruling that the established facts constitute obstruction of justice is
17 reviewed de novo, "giving due deference to the district court's application of the guidelines
18 to the facts." United States v. Bliss, 430 F.3d 640, 647 (2d Cir. 2005) (internal quotation
19 marks omitted). Section 3C1.1(2) of the Sentencing Guidelines requires that a defendant's
20 lies "relate in some manner to the underlying offense or related conduct" to qualify for an
21 obstruction of justice enhancement. United States v. Khimchiachvili, 372 F.3d 75, 78 (2d

1 Cir. 2004), vacated on other grounds sub nom. Berwick v. United States, 544 U.S. 917
2 (2005). A misrepresentation that a defendant is a United States citizen easily falls within this
3 category: citizenship is an important factor when considering bail, United States v. Mercedes,
4 254 F.3d 433, 438 (2d Cir. 2001), and falsely obtaining bail has the “potential to impede the
5 investigation” or prosecution of a case, Khimchiachvili, 372 F.3d at 80 (internal quotation
6 marks omitted).

7 The obstruction of justice enhancement applies, however, only where a defendant
8 “consciously act[s] with the *purpose* of obstruction of justice.” United States v. Peterson,
9 385 F.3d 127, 139 (2d Cir. 2004) (internal quotation marks omitted). “In order to impose a
10 § 3C1.1 obstruction-of-justice enhancement on a defendant who has raised an issue as to his
11 state of mind concerning the conduct alleged to have obstructed or impeded the
12 administration of justice, the court must make a *specific finding* of intent.” United States v.
13 Bradbury, 189 F.3d 200, 204 (2d Cir. 1999) (emphasis added) (internal quotation marks
14 omitted); see also Khimchiachvili, 372 F.3d at 78 (“To enhance a sentence for obstruction
15 of justice, the court must find that the defendant’s statements unambiguously demonstrate
16 an intent to obstruct.”) (internal quotation marks omitted). “We have repeatedly held that an
17 enhancement under § 3C1.1 is appropriate only if the district court makes a finding that the
18 defendant had the specific intent to obstruct justice, i.e., that the defendant consciously acted
19 with the purpose of obstructing justice.” United States v. Brown, 321 F.3d 347, 351 (2d Cir.
20 2003) (internal quotation marks omitted). Moreover, it is not enough that the defendant
21 intended to obstruct the course of justice in *some* judicial or administrative proceeding.

1 Rather, he must intend to obstruct justice “with respect to the investigation, prosecution, or
2 sentencing of the instant offense of conviction.” U.S.S.G. § 3C1.1(1).

3 The district court here did not make the necessary finding of intent. The closest it
4 came was during the sentencing proceeding, when the following colloquy occurred between
5 the district court and defense counsel:

6 Defense: We have submitted previously to Your Honor in an
7 oral argument and I believe from our papers it’s clear that our
8 position was that the statements would be – are just as likely to
9 be made in an effort to affect a collateral proceeding; that is, an
10 Immigration proceeding. While that might be something that
11 affects where within a sentencing range a sentence should fall,
12 a determination that a defendant has made a statement in order
13 to avoid deportation, that is not something that is considered
14 obstructive behavior. And so, if that is the motivation, then I
15 would also say that it shouldn’t be something that affects
16 whether the defendant accepts responsibility.

17 Court: That hasn’t been argued, has it?

18 Defense: It has been argued, Your Honor; that we’ve made
19 clear, I think even from our initial submission, that the
20 statements were just as likely to be designed to affect a collateral
21 proceeding and that [] is not obstructive.

22 Court: But couldn’t it affect both?

23 Defense: It could. But the Second Circuit in [United States v.
24 Reed, 49 F.3d 895 (2d Cir. 1995)] said that the Court has to look
25 at what the subjective intent or what the intent was of the
26 defendant; whether his intent was to obstruct some aspect of this
27 Court case as opposed to Immigration.

28 Court: I do believe that statements made to the Pre-Trial
29 Services Officer who is preparing a report for the Court to
30 determine the defendant’s release status.

31 Defense: I understand
32

33 The statement by the district court, “I do believe that statements made to the Pre-Trial
34 Services Officer who is preparing a report for the Court to determine the defendant’s release

1 status,” does not qualify as a specific finding of intent. While we do not require district
2 courts to use “magic words” at sentencing, where a defendant objects to a proposed
3 obstruction enhancement, “the district court [is] required to make specific, clear, and
4 reviewable findings as to whether [the defendant] intended to obstruct justice.” Bradbury,
5 189 F.3d at 204. We therefore remand the case to the district court for resentencing. See id.
6 at 205.

7 Butters argues that the record could not support a finding of intent. He contends that
8 a reasonable fact-finder would conclude that he lied about his citizenship status not to affect
9 his bail status, but to avoid being reported to the immigration authorities. A reasonable fact-
10 finder might well reach this conclusion, but would not be required to do so. As the district
11 court noted, a defendant’s citizenship status is material to bail, and a reasonable fact-finder
12 could infer that Butters’s lie about this matter, during an interview for purposes of
13 formulating a recommendation with respect to release conditions, was intended at least in
14 part to influence that recommendation. Moreover, the record contains evidence that Butters
15 lied not only about his citizenship but also about his personal history and family members’
16 names and whereabouts, and that those matters materially affected the investigation of the
17 defendant for sentencing purposes. On remand, the district court should make a specific
18 finding as to whether any of Butters’s statements to pre-trial services and/or probation
19 officers was false, and if so, whether any such statement was made with intent to obstruct
20 justice “with respect to the investigation, prosecution, or sentencing” of this criminal case.

1 For the foregoing reasons, the the case is REMANDED to the district court for
2 resentencing.

3 FOR THE COURT:
4 Catherine O'Hagan Wolfe, Clerk of Court
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